

Exhibit F

RALEIGH WAKE CITIZENS ASSOCIATION, ET AL. vs. BAREFOOT, ET AL.
Hearing on 08/02/2016

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF NORTH CAROLINA
WESTERN DIVISION

RALEIGH WAKE CITIZENS
ASSOCIATION, et al.,

Plaintiffs,

vs. No. 5:15-CV-156-D

BAREFOOT, et al.,

Defendant.
_____/

CALLA WRIGHT, et al.

Plaintiffs,

vs. No. 5:15-CV-607-D

STATE OF NORTH CAROLINA,
et al.,

Defendant.
_____/

PROCEEDINGS BEFORE THE HONORABLE
JAMES C. DEVER, III
CHIEF UNITED STATES DISTRICT COURT JUDGE

Tuesday, August 2, 2016
4:00 p.m. - 5:10 p.m.

United States District Court
For the Eastern District of North Carolina
310 New Bern Avenue
Seventh Floor, Courtroom One
Raleigh, North Carolina

Stenographically Reported By:
Denise Y. Meek, Court Reporter

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2 THE BAILIFF: All rise.

3 Court is now back in session, the Honorable
4 Chief Judge James C. Dever, III presiding.

5 Please be seated and come to order.

6 THE COURT: Good afternoon. Welcome to the
7 United States District Court For the Eastern
8 District of North Carolina.

9 We're here for a status conference in the
10 Raleigh Wake Citizens Association vs. Barefoot.
11 It's a consolidated case.

12 The mandate, actually, has not yet issued
13 from the Fourth Circuit. It has been seven days
14 under the rules. The mandate is something that
15 is necessary for this Court to have jurisdiction
16 in the ordinary course. It's my understanding
17 that the mandate will issue first thing in the
18 morning, but since we're all here, we should go
19 ahead and discuss remedial issues in connection
20 with this case while recognizing that I don't
21 have jurisdiction until and unless the mandate
22 issues.

23 I do thank counsel for plaintiffs and counsel
24 for the defendant Wake County Board of Elections
25 for the submissions they made in connection with

1 my order of July 8th, the submissions of July
2 18th, and then another order on July 27th, and I
3 received a submission this afternoon from
4 plaintiffs. I have had a chance to review all of
5 those.

6 And the submission, Mr. Marshall, that y'all
7 made --

8 Well, before we do that, I'd like to note:
9 Who represents the Board of Elections?

10 MR. BERNIER: Good afternoon, Your Honor.
11 James Bernier from the Attorney General's Office
12 here on behalf of the State Board of Elections.

13 THE COURT: Okay.

14 MR. LAWSON: Josh Lawson, general counsel for
15 the State Board.

16 THE COURT: Thank you.

17 And then we have counsel for the Legislative
18 Leaders here?

19 MR. FARR: Good morning, Your Honor. Tom
20 Farr and Phil Strach from Ogletree Deakins.
21 We're here representing the Legislative Leaders.
22 Also, Bart Goodson, who is the general counsel
23 for the Speaker. And we're hoping that one of
24 the lawyers from the Senate, Brent Woodcox, will
25 be here shortly.

1 Thank you, Your Honor.

2 THE COURT: Good to see y'all.

3 And, of course, I know Ms. Earls and
4 Ms. Riggs and Mr. Marshall and Ms. Thaller-Moran.

5 The submission that was made by the Wake
6 County Board of Elections sets forth a variety of
7 deadlines that need to be met at Docket Entry 83.
8 And then there's an affidavit or a declaration
9 from Mr. Sims under 82-1 and a whole host of
10 dates under 83-2 of the submission there.

11 Mr. Marshall, did you want to add anything to
12 those dates or deadlines?

13 MR. MARSHALL: Your Honor, I don't think so
14 other than due to a Fourth Circuit ruling a few
15 days ago on the Voter ID Act, my understanding is
16 that may push the early voting dates back another
17 seven days.

18 THE COURT: Okay. And is that something that
19 the State Board is reviewing? Is that your
20 understanding?

21 MR. BERNIER: Your Honor, it's my
22 understanding that is correct.

23 MR. MARSHALL: Other than that, Your Honor, I
24 believe we're okay on the submissions filed.

25 THE COURT: And those submissions work off of

1 the idea that whatever plan or plans to be
2 implemented, that you needed those, your client
3 needed those by August 10th?

4 MR. MARSHALL: That's right, Your Honor.

5 THE COURT: And how much if any give is there
6 in that date? Is that a hard date?

7 MR. MARSHALL: Well, Your Honor, I think it
8 depends on where we're backing up from, and I'll
9 give you an example.

10 The current date to mail absentee ballots is
11 September the 9th. And in order to have the
12 absentee ballots printed and ready to mail, the
13 Wake County Board of Elections generally starts
14 that process immediately after the deadline for a
15 petition for a write-in candidate expires, which
16 is August 10th.

17 So historically they have used that 30-day
18 period between August 10th and September 9th to
19 test and prepare the ballots and get
20 certifications or approvals from the State Board
21 of Board of Elections.

22 Mr. Sims is here, and if it's helpful to the
23 Court at some point, I'm happy to tender him as a
24 witness to answer questions. I believe that
25 there may be a little bit of give in that 30-day

1 period, but my understanding is they've never had
2 to operate with less than 30 days, so I don't
3 know that historically we have a lot of
4 benchmarks and data points to be able to say
5 whether they could do it in, say, 25 versus 20
6 versus 15.

7 It is my understanding as well, Your Honor,
8 and I think I mentioned this at the beginning of
9 our submission that, and this may be a question
10 for the State Board, but many of these deadlines
11 are able to be modified, obviously, in response
12 to a court order and sometimes at the discretion
13 of the State Board. Were any of those deadlines
14 to be modified, clearly that would change the
15 schedule we've presented, but unless and until
16 those modifications occurred, we didn't want to
17 speculate.

18 THE COURT: So that would be modifications
19 under NC Gen Stat 163-22.2?

20 MR. MARSHALL: That's right, Your Honor.

21 So, again, tagging the August 10th date off
22 of September 9th, if the September 9th deadline
23 was modified, then, obviously, that may allow the
24 August 10th date to be modified, and things may
25 move as a block, but I thought given the current

1 deadlines that are in place that have not been
2 modified, I wanted to let the Court know what the
3 County Board's historical practice would have
4 been.

5 THE COURT: All right. Anything else?

6 MR. MARSHALL: That's it.

7 THE COURT: Okay. I will hear now from
8 Ms. Earls on behalf of the plaintiffs.

9 And, again, I thank you for your submissions.
10 And, obviously, the -- well, did you have any
11 preliminary remarks?

12 MS. EARLS: Yes. Thank you very much, Your
13 Honor. We appreciate your time this afternoon
14 and your attention to this matter.

15 Just to be clear, I want to make sure
16 something I heard a minute ago is correct. The
17 August 10th date is the date by which the County
18 Board of Elections would need to know the names
19 that are going to be on the ballot and whether or
20 not there would be a write-in. So they would
21 need to have a filing period that closes that
22 date, and they would need to know what the
23 districts are at some number of dates -- at
24 least, I think five days before that date -- to
25 stay -- without any other alteration of the

1 deadlines. So I just wanted to make -- I wasn't
2 sure that I heard that come out that way.

3 THE COURT: Mr. Marshall, do you want to --

4 MR. MARSHALL: Yes, Your Honor, and I
5 apologize. Most of that was in my submission
6 about what has to happen before certain dates.
7 But it is true that the August 10th date would
8 require, if there are new districts, it requires
9 a new filing period to open and close before that
10 August 10th date or whatever the date is by which
11 the write-in deadline occurs.

12 THE COURT: And that date, absent either an
13 order from this court or some change in that date
14 under 163-22.2 would be what date?

15 MR. MARSHALL: August the 10th.

16 THE COURT: Okay.

17 MR. MARSHALL: So as we sit here today, Your
18 Honor, there would have to be a filing period
19 that would open and close before that date, which
20 would also require the County Board to have
21 received new maps and then coded the new maps,
22 and then have a notice of filing period and a
23 filing period.

24 THE COURT: So if you get the maps on the
25 10th, do you need them before the 10th?

1 MR. MARSHALL: Well before the 10th.

2 And Ms. Earls made a good point. The way to
3 think about it is the write-in petition deadline
4 is the deadline by which the names of all of the
5 candidates on the ballot will be filed. And so
6 in order to have the names on the ballot, we have
7 to know who the candidates are; in order to know
8 who the candidates are, we have to know who is
9 filed to run in the districts; in order to know
10 who is filed to run in the districts, we have to
11 know what the districts are; in order to know
12 what the districts are, we would need the map.

13 THE COURT: Have those dates all passed? I
14 mean, if it's not -- if it's some -- you said
15 it's some date before August 10th. What date
16 before August 10th?

17 MR. MARSHALL: Well, there isn't a set
18 deadline by which -- well, the filing period has
19 already opened and closed, obviously.

20 THE COURT: Right. Right.

21 MR. MARSHALL: So you would have to -- you
22 would have to open a new -- we would have the
23 authority to open a new filing period, and that
24 would have to occur before August 10th. And in
25 order, operationally, in order to have a filing

1 period, we would have to have new maps, and then
2 Mr. Sims would have to code those maps, which is
3 not a long process, but it's -- the order of
4 events would be receive the new map, code the new
5 map, open and close the filing period, and under
6 the current deadlines that would be August 10th.

7 THE COURT: So just looking at the submission
8 at Docket Entry 83-2 on page two which is
9 attached to Mr. Sims' declaration, just so that I
10 have that understanding, this deadline for
11 verified write-in candidacy petition deadline
12 under 163-123 arises from that statute.

13 MR. MARSHALL: That's right.

14 THE COURT: Okay. And so the State Board
15 would have the authority under 163-22.2 to change
16 that date.

17 MR. MARSHALL: Yes, that's my understanding;
18 they have the authority.

19 And I should have mentioned earlier, Your
20 Honor, I note that some of your last order was
21 questions directed towards the State Board and
22 the Legislative Leaders, and I'm happy to deal
23 with it at any time, but I certainly don't want
24 to be speaking for them. I might ask Mr. Lawson
25 to weigh in and make sure I haven't misspoken

1 about their authority to change that date.

2 MR. LAWSON: So under 22, just 22, not point
3 two, subdivision K, we have the authority to push
4 back the absentee period up until, federal law
5 kicks in at 45 days, but it's 60 days. So if
6 there was a nudge in the calendar, it would be to
7 the absentee, most likely not to the write-in.
8 The write-in would require the 22.2 invocation,
9 versus the absentee, which could be done under
10 20, sub A.

11 THE COURT: All right. Ms. Earls?

12 MS. EARLS: Thank you, Your Honor.

13 I would like to address three points. First,
14 this threshold question of what the scope of this
15 Court's remedial power is in this context, which
16 we've raised in our papers and I'd like to
17 address; secondly, I would like to talk about who
18 is appropriate at this point in time to address
19 those issues; and then, thirdly, to provide you
20 plaintiffs' understanding and interpretation of
21 what the deadlines that are currently operating,
22 what they mean in terms of this case.

23 So first on the question of what the scope of
24 the Court's remedial powers are, I suggest to you
25 first that we look to what the Fourth Circuit has

1 said in this case about what might happen on
2 remand. And the first time they addressed that
3 question is when the Wright vs. North Carolina
4 case was appealed, and the question was whether
5 or not defendants, other than the Wake County
6 Board of Elections, could be sued in this matter,
7 and plaintiffs argued at that point in time that
8 the legislature needed to be a party in the case
9 in order to implement a remedy if plaintiffs were
10 successful. And the Fourth Circuit said -- and
11 I'm just going to read from the opinion. This is
12 at pages 262 to 263: "Plaintiffs counter that if
13 the proposed defendants are not party to their
14 suit, there will be no mechanism for forcing a
15 constitutionally valid election should they
16 succeed in enjoining the Session Law. This
17 assertion is, however, incorrect." That's the
18 Fourth Circuit; we were incorrect. "The District
19 Court could, for example, mandate that the Board
20 of Elections conduct the next election according
21 to the scheme in place prior to the Session Law's
22 enactment until a new and valid redistricting
23 plan is implemented. State law also provides,
24 for example, that the State Board of Elections
25 can make reasonable interim rules with respect to

1 pending elections." And then they cite the
2 statute we've been talking about. "Without
3 question, then, a valid election could take place
4 if the plaintiffs succeed on the merits and
5 successfully enjoin the Session Law."

6 So if initially --

7 THE COURT: But your submission says that it
8 has to be a remedy and that the Court, at least
9 that's the way I read it, and it's interesting,
10 that you said that the Court has no authority to
11 do anything other than that.

12 MS. EARLS: Well, in these circumstances, the
13 Court has no authority to do anything other than
14 enjoin the statutes that have been found to be --

15 THE COURT: I understand -- I understand the
16 injunction is different than what the remedy is.
17 I read, and maybe I misread your papers, and I'd
18 like you to tell me, I thought you cited the
19 Cleveland County case today for -- the two cases
20 that I thought y'all cited for the proposition
21 that this Court lacks authority to do anything
22 other than implement the old plans were the
23 Dillard County and the Cleveland County case.

24 MS. EARLS: Yes, Your Honor, I believe that
25 is the implication and the force of the Cleveland

1 County case. And the reason is, and what makes
2 this case so different from so many other
3 one-person-one-vote cases and other redistricting
4 cases is that here we have a constitutionally
5 valid set of districts for both the County
6 Commission and the School Board that have already
7 been enacted and already been used.

8 In most cases where a one-person-one-vote
9 claim is brought, and this is the Larios vs. Cox
10 instance, the claim is being brought against a
11 plan that was drawn immediately after the Census.
12 So the previous plan in place in the prior decade
13 is no longer constitutional under one-person-one-
14 vote grounds, the new plan was not constitutional
15 under one-person-one-vote grounds, so there was
16 essentially no plan that was constitutional that
17 could be used.

18 In those circumstances, the Court's
19 obligation is to give the jurisdiction the first
20 opportunity to redraw; and if they are unable to
21 do so, then the Court's remedial authority to
22 either appoint a special master, as many courts
23 do, but their authority to implement the
24 Court-ordered plan kicks in.

25 THE COURT: See, but that's where you're then

1 reading Cleveland County to say that I have no
2 authority to do anything. Cleveland County is
3 really a case about the authority of Cleveland
4 County. Right? It was -- the ultimate holding
5 in that case from the DC Circuit was that there
6 was no Voting Rights Act violation.

7 MS. EARLS: Right.

8 THE COURT: It was a consent decree with no
9 violation, and the County Commission lacked
10 authority under state law to effectuate the
11 remedy that was in the consent decree, but you
12 read that as a limit on the power and discretion
13 of the United States District Court.

14 MS. EARLS: Correct, Your Honor, because what
15 was reversed, what was essentially summary
16 judgment granted was that the District Court's
17 order implementing that consent decree was
18 without force and power. And it contrasted that
19 to the Moore vs. Beaufort County case, again, a
20 consent decree, a limited voting method of
21 election not authorized under state law. The
22 difference there in the Moore County case where
23 the Court enforced the consent decree was that
24 the parties had stipulated that there was a
25 violation of the Voting Rights Act.

1 THE COURT: Right, but isn't that a key legal
2 difference, though, that where the Fourth Circuit
3 has found a violation to then say that
4 notwithstanding a constitutional violation, that
5 a District -- that a United States District Court
6 has no power, other to do this one thing? That
7 just -- it just -- it strikes me as odd.

8 MS. EARLS: Well, because, Your Honor, in
9 this circumstance we have an existing plan that's
10 been put in place pursuant to state law.

11 THE COURT: Right, but there's a difference
12 between perhaps it could be a remedy and saying
13 it has to be the remedy as a matter of law.

14 Like the Dillard case that y'all cited, also,
15 that case is a case where a District Court found
16 a violation, enjoined an electoral scheme in
17 Alabama, created I think a seven-member County
18 Commission instead of four-member County
19 Commission, who had the authority to create seven
20 single-member districts, ultimately reversed
21 itself, dissolved the injunction and then said,
22 "Now that I've dissolved this federal injunction,
23 the law that was in effect becomes enforceable
24 again." Right? And so that also doesn't seem to
25 be analogous, and so I wanted to hear what your

1 take on that was.

2 MS. EARLS: So our position, Your Honor, is
3 that if there was something unconstitutional
4 about the 2011 plans, and the jurisdiction could
5 not remedy the situation, then this Court's
6 remedial powers would kick in. And that's clear
7 from the Supreme Court cases. The Court
8 implementing a map is a last resort.

9 Here we have a fully constitutional election
10 scheme for both these bodies, and that's the
11 scheme that you would have to find is
12 unconstitutional in order for there to be a
13 situation where there is no plan in place enacted
14 legally under state law that can be used.

15 THE COURT: But isn't it different if in
16 essence those -- it's different if they have been
17 supplanted by legislation, right? You don't
18 think that that matters?

19 MS. EARLS: Well, I think that there a number
20 of cases in the Section 5 context which is very
21 analogous where the Court says --

22 THE COURT: But is it really? I mean, is it
23 that analogous? Because Section -- under the
24 days of Section 5, until you got free clearance,
25 it wasn't enforceable.

1 MS. EARLS: Right.

2 THE COURT: Right? And so the other plan was
3 always the law and never stopped being the law as
4 opposed to a legislature enacting new legislation
5 and repealing old legislation.

6 I mean, I understand the argument, but I was
7 just trying to understand the proposition, not
8 that the Court has the discretion to adopt that
9 as a remedy, but the notion that as a matter of
10 law under either Cleveland County or Dillard,
11 those are the two cases that you seem to cite
12 that that's mandated.

13 MS. EARLS: And our position, Your Honor, is
14 that this Court's authority to order a remedial
15 plan only kicks in if there isn't an existing
16 plan that's been duly put in place consistent
17 with state law and is constitutional. In that
18 last resort, then the Court's power kicks in.

19 But here we have a plan that can be used and
20 has been used. And the Section 5, there are
21 several Section 5 cases. Riley vs. Kennedy is
22 one that we did not cite in the supplemental
23 filing, but Riley vs. Kennedy is a US Supreme
24 Court case from 2008, where the jurisdiction had
25 started implementing the change even though it

1 had not been precleared, and the Court said that
2 it's not effective because it hadn't -- it was
3 not constitutional.

4 But I think --

5 THE COURT: But it was not precleared.

6 MS. EARLS: It had not -- it was not -- it
7 did not comply with federal law, and federal law
8 is superior. But the general proposition is that
9 the Court only --

10 And then another case that we do cite is
11 McGhee vs. Granville County, which is another
12 example of, there was a violation found, there
13 was no legal and constitutional plan or system to
14 go back to, but in McGhee vs. Granville County, a
15 Fourth Circuit case, the District Court
16 implemented the plaintiff's proposed remedy over
17 what the jurisdiction had proposed because in the
18 Court's view it was a more complete remedy, and
19 the Fourth Circuit said that the Court doesn't
20 have that discretion. If the jurisdictions put
21 forward a constitutional, legal plan, then unless
22 the Court finds something infirm about that, it's
23 the one that needs to be used.

24 And so my position is that in these
25 circumstances, where we have a constitutional

1 plan in place for both of these bodies, the Court
2 doesn't have, in essence, the option to reject
3 those, that it has to go back to the plans that
4 have been in place that were passed pursuant to
5 state law. Until the General Assembly acts, or
6 in the case of the County Commission, which has
7 under state law the authority by referendum to
8 change its method of election, the County
9 Commission could enact a change.

10 And that's the significance of the language
11 in the Cleveland County case. The DC Circuit
12 says North Carolina state law is very specific
13 about how you have to go about changing your
14 method of election. And if you don't have a
15 violation of the existing system, there's no
16 power or authority of a federal court to come in
17 and order something different. So that's our
18 position there.

19 And I think, as I started to say, not only is
20 the Fourth Circuit's opinion in Wright
21 instructive here, because it very clearly
22 suggests that that's what should happen here.
23 But the most recent opinion where the Court
24 concludes its opinion in the slip opinion at page
25 star 45: "We remand with instructions to enter

1 immediately judgment for plaintiffs granting both
2 declaratory relief and a permanent injunction as
3 to the one-person-one-vote claims." The Court
4 didn't say, "We remand for consideration
5 consistent with this opinion, we remand for
6 consideration of whether or not there's time to
7 implement a remedy," it clearly said --

8 THE COURT: But you would also agree that
9 nowhere it says, "We remand and instruct that the
10 plans in effect in 2011 we could use." I mean,
11 had it said that, had it said that in plain
12 language, then y'all wouldn't have to be here.

13 MS. EARLS: Well, except, Your Honor, I think
14 they already said it. I think they said that in
15 2015 in the first opinion in this case where they
16 said the District Court could mandate --

17 THE COURT: But they also then
18 cross-referenced the order, the state order under
19 163-22.2, in that passage you read.

20 MS. EARLS: Right, to make the administrative
21 changes that are necessary to implement -- to go
22 back to the prior system. Because to be sure,
23 there are a couple of administrative changes,
24 particularly with regard to the Board of
25 Education. And I think it is important to

1 consider the two bodies separately because the
2 County Commission elections are at a different
3 stage and a different status than the Board of
4 Education elections. But there are
5 administrative changes that need -- we're not in
6 a situation to simply proceed exactly as state
7 law currently provides.

8 So let me -- and the final thing I'll say is
9 that the Perez vs. Perry case of the US Supreme
10 Court also stands for this proposition. The
11 Supreme Court in 2012 said: "Redistricting is
12 'primarily the duty and responsibility of the
13 State.' The failure of a State's newly enacted
14 plan to gain preclearance prior to an upcoming
15 election does not, by itself, require a court to
16 take up the State legislature's task. That is
17 because, in most circumstances, the State's last
18 enacted plan simply remains in effect until the
19 new plan receives clearance."

20 THE COURT: Right. I guess that runs into
21 that whole issue of is, is even under what you
22 propose, under the -- when we talk about a last
23 enacted plan and scheme, there were odd-year
24 elections in the School Board.

25 MS. EARLS: Right.

1 THE COURT: We have nine seats that are going
2 to expire. They're going to be out of office on
3 December 5, 2016. Right? The nine School Board
4 members?

5 MS. EARLS: Well, under the new statute. And
6 that's where our arguments about staggerability I
7 think are also relevant.

8 THE COURT: But, again, even under your
9 theory, you want to nix -- you don't want to
10 really go all the way back and have odd-year
11 elections and, what, have the Court order that
12 the current School Board just stay in place
13 unelected and then be elected in odd years and
14 then...

15 MS. EARLS: No, no, Your Honor, what we've
16 said in our papers is that with regard to the
17 School Board elections, the most -- the most
18 efficacious way to return to the prior system is
19 to have the five districts that were elected in
20 2011 elected for three-year terms in 2016. And
21 then next year in 2017, the four districts that
22 were elected in 2013 will again be up for
23 election as they would have been under the old
24 system. And then you will have it staggered,
25 you'll have a nine-member board, staggered terms,

1 elected in odd years.

2 THE COURT: But that would then require this
3 Court to order that they be, assuming if they
4 want to, to stay in place for another year,
5 right, for those four?

6 MS. EARLS: No. Well, not if we are in the
7 old system. The only thing that that requires is
8 the State Board to administratively say we will
9 have -- in essence, we're having a delayed
10 election that should have happened in 2015; we
11 are now having it in November 2016, and that it
12 would be three-year terms instead of a four-year
13 term. And that's the administrative adjustment
14 that would return us back to the old system for
15 the School Board.

16 THE COURT: Okay. Anything else?

17 MS. EARLS: Yes. I want to just preserve for
18 the record the plaintiffs' position that the
19 legislative defendants have not -- they filed a
20 motion to intervene with the Court of Appeals
21 which hasn't been ruled on. Plaintiffs filed a
22 motion, or filed a response opposing that motion,
23 and we continue to take the position that it's
24 not appropriate for them to intervene in this
25 matter. And so we don't want to -- we want to

1 preserve our continuing objection to their
2 addressing anything substantively.

3 We did not file anything seeking to strike
4 what they filed in response to the order because
5 it seemed to us to be us akin to a news brief,
6 and that's not inappropriate, but for them to
7 participate today as a party, we don't want to be
8 in any way waiving our objection to them
9 intervening in this case.

10 The final thing I wanted to say is that the
11 deadlines that currently exist with regard to the
12 election schedule for 2016 can be best met by
13 using the existing districts. The voters have
14 been assigned to those districts in the past.
15 It's the easiest to implement. The shapefiles
16 are already at the Board of Elections.

17 And the, particularly with the County
18 Commission election system, the only thing
19 that -- enjoining the use of the new system
20 simply means that the primaries for the A and B
21 Districts would be void, and the current
22 elections for the County Commission districts
23 where there were primaries would proceed --

24 THE COURT: Districts 4, 5 and 6.

25 MS. EARLS: Correct.

1 -- would proceed as they are already
2 underway.

3 So that's actually, for the County
4 Commission, it's actually very little that
5 implicates the election schedule. But for the
6 School Board, for those five districts that we
7 contend should be elected this year, to get that
8 School Board back on the staggered schedule in
9 odd years, those district elections can proceed
10 if a filing period is opened in the next day or
11 two.

12 So not only would I submit to you is, going
13 back to the prior election method, what is
14 required in these circumstances from a pragmatic
15 point of view is also the easiest to implement
16 and the easiest to administer, and the least
17 confusion for voters; they've already been using
18 these districts. It truly is, for all the
19 parties involved, the best way to proceed in
20 these circumstances.

21 Thank you.

22 THE COURT: Thank you.

23 MR. BERNIER: Your Honor, we're here from the
24 State Board.

25 THE COURT: Y'all can come up to the table,

1 if you'd like.

2 Again, I thank you for the submission that
3 y'all made at Docket Entry 81 in which you
4 describe the State Board accurately as an
5 independent bipartisan board with its remedial
6 authority under 163-22.2, and then as the North
7 Carolina Court of Appeals interpreted it in the
8 Newsome case.

9 Do you have any preliminary remarks?

10 MR. BERNIER: Your Honor, not anything other
11 than I believe Your Honor already knows.

12 First, I'm general counsel, I'm counsel to
13 the Attorney General's Office. General counsel
14 for the State Board is also present, along with
15 Executive Director Strach. They are available to
16 answer any of Your Honor's questions.

17 And, in fact, as to the details and the
18 timing and the schedule, I would defer to
19 Attorney Lawson, who is present here at counsel
20 table to my left. But just preliminarily, Your
21 Honor, as we said in our submission, that
22 163-22.2, Your Honor, we believe is more of the
23 administrative organizations of the State Board
24 to adjust the scheduling and timing of the
25 processes involved in the election, more so than

1 the redrawing of district lines.

2 In a prior order Your Honor had asked whether
3 the State Board would be willing to redraw
4 district lines and was -- the State Board is --
5 can't take the position that it is neither
6 willing or unwilling, but for practical purposes
7 at this point in time we can't just because of
8 the lack of the software, the training, the
9 staff, everything that's needed to actually pull
10 together the district lines, to redraw district
11 lines.

12 Your Honor, Attorney Lawson is here to answer
13 any of Your Honor's questions. The timing, it's
14 my understanding that, as Mr. Marshall said
15 earlier, there is some flexibility as to the
16 deadline of the absentee ballots, which would
17 then impact the deadline for the write-in
18 ballots. But as to a particular position or a
19 particular remedy, Your Honor, I don't believe
20 the State Board has a particular position on
21 which remedy is a proper one, just that we need
22 it sooner rather than later so we can implement
23 as needed.

24 THE COURT: All right. I'll hear from
25 Mr. Lawson.

1 Mr. Lawson, is it the State Board's position
2 that you do have the authority under 163-22.2 to
3 remedy the constitutional defect?

4 Again, if you look at just the two plans at
5 issue, which, of course, is the same plans. You
6 have an ideal population in each district of
7 128,713 people, and an ideal population in the
8 two super districts of 450,497 people, and then
9 you have a statute that I think the General
10 Assembly enacted in 1981 that says in the event
11 any state election law or form of election of any
12 County Board of Commissioners or local Board of
13 Education is held unconstitutional by a state or
14 federal court, and such ruling adversely affects
15 the conduct and holding of any pending primary
16 election, the State Board of Elections shall have
17 authority to make reasonable interim rules and
18 regulations with respect to pending primary
19 elections as deemed advisable so long as they do
20 not conflict with any provision of Chapter 163 of
21 the General Statutes. And such rules and
22 regulations shall become null and void 60 days
23 after convening of the next regular session of
24 the General Assembly. And then the Court of
25 Appeals interpreted that statute as a remedial

1 statute in the Newsome case. So do you think you
2 have the authority to do it?

3 MR. LAWSON: So following Director Strach's
4 admission to the Court, on the 18th, the State
5 Board had a meeting, which we have transcripts of
6 if Your Honor would like those submitted, the
7 State Board at that time did not take a vote on
8 the particular questions, but at a number of
9 references there was a general meeting of about
10 four members indicating that they think it's best
11 done and left to the legislative side of our
12 government.

13 Secondly, though, there was the
14 distinction drawn between any type of action
15 taken under 22.2 versus action taken on the
16 request of the Court and through the
17 jurisdiction, it's much broader of your bench-
18 crafted appropriate relief and remedy in this
19 case.

20 So there were kind of two pieces. One was a
21 historic look at 22.2 and the fact that it had
22 not been used for anything in the scale of
23 redistricting.

24 Secondly, when used, there is an
25 expiration date that is automatic and built into

1 the statute such that there was uncertainty in
2 the Board's discussion as to whether that was
3 appropriately seen as a tool for redistricting.
4 Districts, of course, optimally are not temporary
5 in nature.

6 So while we did not take a definitive stand
7 one way or the other on the permissibility of
8 22.2 as a tool, there was a general expression
9 from members of the Board that they wished to do
10 whatever the Court believed they should do, and
11 preference expressed by a couple of them that we
12 act within the Court's remedial jurisdiction
13 rather than 22.2.

14 I would enter, also, Your Honor, that under
15 163-22, sub L, our decisions can be brought into
16 Superior Court in Wake County where they are
17 reviewed on a deferential agency type review.
18 However, final decisions of our agency could
19 transfer jurisdiction if not acting directly
20 under your authority but rather under our general
21 statutory authority.

22 THE COURT: All right. Anything else?

23 MR. LAWSON: Your Honor, our objections to
24 logistics. We have done some further digging,
25 getting some price points with different vendors

1 of software that we know are in use in other
2 states.

3 Our GIS specialist is in India until the 22nd
4 and will be back to work on the 23rd. We only
5 have one GIS specialist, and he would be our
6 point person for any type of software based
7 redistricting.

8 THE COURT: And that's the person in India?
9 Is that the one person that you have, and that
10 one person is in India?

11 MR. LAWSON: It's the one that we have
12 in-house, sir.

13 THE COURT: Oh, okay.

14 MR. LAWSON: Yes, sir. This was a leave
15 approved, a yearly visit to his family, it got
16 approved back in April, but he has been there and
17 is still there.

18 But we did some pricing around, and it looks
19 as though we would have to go through state
20 procurement at a competitive bidding process
21 because there are alternative vendors out there
22 that substantially would perform the same
23 functions, unless you were to direct the
24 legislative resources coordinate with us or
25 others, but we would have to leave that to you.

1 This process takes upwards of eight weeks even
2 when expedited.

3 The reason that we think that that's
4 important is because while we don't have
5 technical skill in-house at present to be able to
6 perform the redistricting, we also have not had
7 experience applying traditional redistricting
8 principles, especially if you throw into it
9 things like communities of interest and political
10 subdivisions, also are requiring that we adhere
11 as closely as possible to permissible legislative
12 intent that you referenced in your order, I
13 believe the July 5th.

14 MR. BERNIER: 8th.

15 MR. LAWSON: 8th. Pardon me.

16 THE COURT: Okay. Anything else?

17 MR. LAWSON: No, sir.

18 THE COURT: Okay. Thank you.

19 Mr. Farr, if you would just come up.

20 Again, I've reviewed all of the submissions,
21 the submissions that y'all made at Docket Entry
22 84. Would like to make any remarks?

23 Or Mr. Strach?

24 MR. FARR: Thank you very much, Your Honor.

25 I have a few comments; although, I'll try not to

1 repeat what we've filed with the Court.

2 First of all, Your Honor, I want to clarify
3 that the legislature was never a party in any of
4 these cases. The legislature and the Legislative
5 Leaders were not defendants in the first case,
6 which I think was the School Board case. The
7 legislature or the Legislative Leaders were not
8 represented in that case.

9 It's my understanding that plaintiffs did
10 make the Legislative Leaders as a defendant in
11 the second case, the Commissioners case, and that
12 the plaintiffs took a voluntary dismissal of the
13 legislators in that case after the Fourth Circuit
14 ruling. So I just want to make sure that
15 everyone understands that the legislature was
16 never a defendant in either one of these cases.

17 Next, Your Honor, we strongly do not believe
18 that the State Board of Elections has the
19 authority to do redistricting plans to remedy
20 violations found by courts. The Court is very
21 well aware of the myriad number of cases that
22 we've had in North Carolina, and that statute has
23 never been interpreted to give the State Board
24 the authority to draw up redistricting plans in a
25 situation like this. It's interpreted to give

1 the State Board the authority to change election
2 schedules.

3 And consistent with that, Your Honor, you've
4 heard the State Board attorney just referenced
5 the fact that they do not have the software
6 that's typically used to draw the plans, they
7 don't have anyone on their staff that's ever
8 drawn plans. The one person who might be able to
9 learn how to draw plans, I think I heard him say
10 that he is out of the country until August 22nd.
11 So if something is going to happen this year, the
12 plans are not going to be drawn by the State
13 Board of Elections, nor should they be drawn by
14 the State Board of Elections.

15 Your Honor, I don't want to belabor the
16 point, but we have made our statement that we do
17 not think it's proper to go back to the 2013
18 plans because they do not represent the most
19 recent policy decisions made by the legislature.

20 The Legislative Leaders do have an
21 illustrative plan available, Your Honor, which we
22 could file with the Court tomorrow, if the Court
23 would like to see an illustrative plan. We think
24 that plan remedies the constitutional problems
25 found by the Fourth Circuit, and we'll be happy

1 to provide that to you, and all of the
2 information that goes along with that.

3 As far as election schedule, Your Honor, we
4 basically think that given where we are, it's
5 going to be very, very difficult to have
6 elections under a different plan in time for the
7 November general election. We do defer to the
8 State Board of Elections as having superior
9 expertise on all the nuances that go into
10 scheduling an election, Your Honor.

11 But one thing we want to be very strong
12 about, Your Honor, is that we do not think there
13 should be a new election schedule that reduces
14 the amount of time for voters in Wake County to
15 cast absentee ballots. We had a discussion or we
16 heard a discussion about that today from some of
17 the counsel. For example, we don't think that
18 it's fair to the voters of Wake County in a
19 presidential year for them to have some of the
20 time for absentee voting cut back 45 days when
21 everyone else in the state is permitted 60 days
22 to do absentee voting. So we would be strongly
23 opposed to any election schedule that would do
24 that.

25 THE COURT: What do you have to say about

1 Footnote 13 of the Fourth Circuit's opinion just
2 in terms of this whole issue of debriefing on the
3 mandate rule and whether the circuit has mandated
4 the injunction?

5 MR. FARR: Well, Your Honor, I think -- I
6 wasn't there at the oral argument, but it does
7 not seem as though anybody briefed or argued the
8 position about what the appropriate remedy would
9 be at this point in time in the election cycle.

10 The footnote I think says that the Fourth
11 Circuit sees no reason why elections should go
12 forward under the plans they found
13 unconstitutional, but this didn't really consider
14 what those reasons may or may not be.

15 And I think in one of your orders, Your
16 Honor, you cited a couple of cases where the
17 Supreme Court has held that on issues like this,
18 it's appropriate for the District Court to be the
19 entity that analyzes what the facts and
20 circumstances are at this point in time in the
21 election cycle and then make a decision based
22 upon your exercise and your discretion on what
23 was appropriate given where we are today.

24 So I do not think you've been -- I don't
25 think the elections under the plans have been

1 declared illegal and have been ruled out.
2 Depending on what the circumstances are, if the
3 Court and the State Board of Elections thinks
4 that we can still get a new plan in time within
5 the filing period and have an appropriate amount
6 of time for absentee voting, we do have an
7 illustrative plan that we could give the Court
8 tomorrow.

9 THE COURT: And you just -- so the mandate
10 rule cases that the plaintiffs cite, you just
11 don't think that the footnote encompasses a
12 mandate to issue that injunction? Obviously,
13 that's got to be logically your position, right?

14 MR. FARR: No, sir, Your Honor, I think if
15 they, if that's what they intended, they would
16 have been more specific about what you could or
17 could not do. They all said that based upon the
18 record that was in front of them, they saw no
19 reasons why elections should go forward under the
20 plans ruled unconstitutional, but no one
21 explained what the circumstances were.

22 We're at a very, very late time in the
23 election cycle, and I know the Court is very well
24 aware of, for example, the Shaw case where we
25 have a finding by a US Supreme Court that

1 Congressional District 12 is illegal. But the
2 mandate came out even earlier, I think, than what
3 we're seeing here, and a three-judge court and
4 this court ruled that it was too late to change
5 things at the end of the July for 1996 election
6 cycle.

7 So I think you have a very hard job, Your
8 Honor, and I think it's one where you have to
9 exercise your discretion in a way that would
10 protect the voting rights of all of those of Wake
11 County. And if you conclude that there needs to
12 be an election, and if there's enough time, we
13 will have an illustrative plan available for you
14 to review tomorrow should you ask to receive it.

15 THE COURT: Well, certainly, assuming the
16 mandate issues, and I have jurisdiction, you can
17 file it. I'll try to get information so that
18 when I finally have jurisdiction I can exercise
19 my discretion.

20 Anything else?

21 MR. FARR: May we file that tomorrow, Your
22 Honor?

23 THE COURT: You may. You may.

24 MR. FARR: Unless you have further questions,
25 Your Honor, we have nothing else.

1 THE COURT: All right.

2 MS. EARLS: Your Honor, I just have to note
3 for the record, we do object to illustrative maps
4 being filed by entities that aren't parties and
5 with the Legislative Leaders not able to speak
6 for the legislature. They are just individual
7 legislators. There may be other legislators who
8 have illustrative maps. In fact, there were
9 illustrative maps in the record that were
10 presented to the legislature. And to have a
11 process whereby in 24 hours two legislative
12 leaders who have been invited by the Court to
13 submit something, we will object to that as not a
14 fair process, Your Honor.

15 THE COURT: That's fine.

16 MS. EARLS: And I also want to, if I may,
17 respond to the comments that were made regarding
18 the mandate. As you know, our position is that
19 the mandate is clear.

20 Counsel's reference to the Shaw case is not
21 applicable for at least two reasons. First of
22 all, that was a congressional district which
23 encompasses numerous counties. The prospect of
24 what it takes to change district lines across
25 several counties in a congressional district is

1 very different from what it takes
2 administratively to put in place a plan for the
3 Wake County Board of Education. So that's all
4 we're talking about here is the Board of
5 Education.

6 Secondly, the fact that in that case there
7 was no constitutional plan passed pursuant to
8 state law and fully compliant with federal law
9 available to be used in those circumstances, in
10 the Shaw case, where as here there is.

11 So those are two very important reasons why
12 the fact that -- and it was actually the very end
13 of July of that year the federal court said that
14 there was not time to make a change with regard
15 to a congressional district. That does not apply
16 to the circumstances you face here today with
17 regard to the Wake County Board of County
18 Commissioners and the School Board.

19 THE COURT: Tell me again your proposal about
20 how long -- who gets elected to the School Board
21 under your proposal in November? The Wake County
22 voters only get to vote for five instead of all
23 nine, even though by statute all nine are
24 supposed to be out of office on December 5th?

25 MS. EARLS: Well, Your Honor, again, you keep

1 saying by statute. That statute is
2 unconstitutional.

3 THE COURT: The redistricting --

4 MS. EARLS: There is no severability clause
5 in that statute, Your Honor. The entire statute
6 is unconstitutional.

7 THE COURT: That goes back to the whole issue
8 of remedial discretion, right? And in terms of
9 all of those cases that you're familiar with,
10 that we're all familiar with is, is the
11 declaration a declaration the entire statutory
12 scheme, or is it a declaration of the one-person-
13 one-vote violation of the difference in
14 populations?

15 MS. EARLS: And we laid out the applicable
16 law, which I would say was, and was reaffirmed by
17 the Fourth Circuit's analysis in the NAACP case
18 that they just decided. That is to say,
19 severability is determined by reference to state
20 law firm. Under North Carolina law, you look not
21 only to whether or not there's a severability
22 clause but also to whether or not the provision
23 that's being challenged can be and was intended
24 to be implemented on its own.

25 Here we have for better or worse, an election

1 scheme. It changed the date of the election, it
2 changed the size of the Board in one instance, it
3 changed the districts. You can't take the
4 districts out of that and implement the rest of
5 the statute. That's our contention.

6 THE COURT: But my question, again, is: If
7 you were going back in time, then isn't the
8 theory of the plaintiffs that all these elections
9 to the School Board should be in odd years?

10 MS. EARLS: Correct, Your Honor, but you
11 have -- you have --

12 THE COURT: Well, that's what I'm trying to
13 understand. Why is that -- why is that policy
14 preference that's in Session Law 2013-110
15 implemented in a remedy when the theory seems to
16 be that we're going back in time to what was the
17 scheme in 2011, which was odd-year elections.

18 MS. EARLS: Your Honor, what we are saying is
19 that because the districts are not severable from
20 the rest of the statute, the statute is
21 unconstitutional, it's a violation of my clients'
22 rights to try to implement that statute, so you
23 go back to the last system that was in place.

24 THE COURT: And that's my question. If we go
25 back to that system, then, logically, and that's

1 what I'm trying to understand, you must think
2 that I have some discretion, because, logically,
3 under your position, the people of Wake County
4 don't get to vote for anyone on the School Board
5 this year because historically we've always only
6 voted in odd years, and this isn't an odd year.
7 And so we just basically tell all the -- and we
8 have -- we have a population in Wake County
9 that's larger than the population of six states,
10 and telling the people of Wake County that they
11 don't get to vote for all nine School Board
12 members, I'm really trying to understand why that
13 is.

14 MS. EARLS: Your Honor, in 2011, five members
15 of the School Board were elected. They've
16 actually had five-year terms now.

17 THE COURT: Right, by virtue of that statute.

18 MS. EARLS: Correct. So our position is that
19 the most logical way to return to odd-year
20 elections is to, for those people who have
21 already been in office for five years, is to --
22 in essence, there is now a delayed election. It
23 should have been in 2015 under the old system;
24 it's now 2016.

25 And I think that the remedy in the case that

1 you cited, Newsome vs. North Carolina State Board
2 of Elections, back in 1992, where the State Board
3 had to make administrative rules for the timing
4 of an election applied here.

5 So, in essence, what the State Board is faced
6 with is for reasons having to do with the
7 litigation schedule and when these laws were
8 found unconstitutional, an election that should
9 have happened in 2015 did not happen. So when
10 should that election happen? At the next
11 available election date, and that's 2016.

12 There are four members of the School Board
13 who were elected in 2013. Typically, under the
14 old scheme, you have four-year terms. Those four
15 board members can be elected in 2017. So we're
16 not --

17 THE COURT: But when they were elected, did
18 those people know that they were being elected
19 for three-year terms?

20 MS. EARLS: When the School Board elections
21 happened in 2013, I believe that was before this
22 statute was passed; or at least initially, the
23 election process started.

24 But the bottom line is, getting back to the
25 prior system of staggered terms elected in odd

1 years, those members elected in 2014 or 2013
2 would have four-year terms and be reelected or
3 those seats would be up for election again in
4 2017.

5 THE COURT: And you're saying that you think
6 that I should use my -- or do you think I have
7 the authority to do that?

8 MS. EARLS: Your Honor, we've said, again,
9 and I'm sorry, our position, Your Honor, is that
10 your authority is to enjoin the existing statute.
11 Then the State Board of Elections' authority kicks
12 in to make the administrative changes. Not to
13 draw new maps; to make the administrative changes
14 regarding --

15 THE COURT: Well, that's what I'm talking
16 about, the administrative change of extending a
17 person in office for a year.

18 MS. EARLS: But that's already happened.
19 They're not extending anyone's term, Your Honor.

20 THE COURT: I thought you just said that what
21 you wanted to have happen was to have the people
22 who were elected in 2011, when they were elected,
23 they were elected to a four-year term. As I
24 understand it, and correct me if I'm wrong, as I
25 understand it, they were elected to a four-year

1 term, and Session Law 2013-110 extended their
2 office for a year. I don't think any of them
3 did, but whatever. The legislature said, "You're
4 now going to be in office until December 5, 2016.
5 That's when your office ends." And then the
6 people in 2013 who got elected got elected, and
7 you said you don't think that they knew they were
8 being elected to a three-year term.

9 MS. EARLS: But in any case, Your Honor,
10 we're not suggesting that the State Board of
11 Elections would be extending any terms; to the
12 contrary. We're saying they can use their
13 administrative authority to schedule the timing
14 of elections and to have those five seats up for
15 election in 2016, the five seats, the five people
16 who were elected in 2011. That is an
17 administrative change. The State Board of
18 Elections would not be extending anyone's terms
19 in that regard.

20 THE COURT: What about the four people who
21 were elected in 2013?

22 MS. EARLS: Under the prior system the
23 customary term was four years. So that is not a
24 change for them to then be elected in 2017.

25 THE COURT: Let me hear what the State Board

1 has to say about that. If you have a position on
2 it. Or if you want to reflect on it, you can
3 also tell me that.

4 MR. LAWSON: Your Honor, we have not voted on
5 the severability position. We would note,
6 though, that if the Court was to direct us to use
7 that administrative authority, first, of course,
8 that it still could make its way into Wake County
9 Superior Court effectively transferring
10 jurisdiction.

11 Secondly, in Session Law 2013-110, section 2,
12 there's a specification about a primary versus a
13 runoff election system. Those types of
14 determinations certainly are not of the type that
15 we would be happy to make. Ordinarily, under
16 22.2, the pieces of the statute that we like to
17 enforce are not enforced. So our one request,
18 the one request that was mentioned by our Board
19 at its meeting was that the directive or the
20 order or request, depending on how you frame it,
21 to us be very specific.

22 THE COURT: And so you want -- the State
23 Board wants the Court to, what, to address that
24 issue and to say whether the Wake County voters
25 get to vote for nine members of the School Board

1 this November or not? Or not? Or do y'all want
2 to make that decision?

3 MR. LAWSON: It would certainly be
4 unprecedented for us to use 22.2 to try and
5 extend the terms or otherwise to decide the
6 severability of pieces of the plan enacted in
7 2012 versus the one after.

8 If we were called upon to do that, our board
9 has decided that it will try as best it can to
10 comply but recognizes the necessity of also
11 implementing permissive legislative intent. It
12 is not ordinarily a place that we like to be to
13 the outcome determinative to that extent.

14 THE COURT: And Ms. Earls, you're just not
15 sure one way or the other whether the people who
16 got elected in 2013 knew they were being elected
17 to a three-year term or not? You just don't
18 know? And you can -- you can supplement
19 tomorrow. I know you're a very careful and
20 thoughtful lawyer and you don't want to guess.
21 You just aren't sure?

22 MS. EARLS: Your Honor, I'm not entirely
23 certain of the dates of the election and the date
24 of the passage of the statute. It may be that
25 there's a difference in terms of the filing

1 periods. So they have may have filed at a time
2 when it was a four-year term. I just -- I would
3 really prefer to be able to be clear about the
4 dates and the passage of the dates of the
5 election.

6 THE COURT: Because, at least, again, the
7 trial exhibit was Exhibit 438, which was the
8 Session Law, and it said that it was "read and
9 ratified this, the 13th day of June, 2013," which
10 would at least suggest that if the elections to
11 the School Board were in October of 2013, then
12 the people who ran knew they were getting elected
13 to three years. But y'all can check that.
14 That's at least what -- that's -- and, again,
15 that was a joint exhibit that y'all had submitted
16 at the trial, which was just a copy of that
17 legislation. Which, again -- but you seem to
18 suggest -- it sure seems like more than an
19 administrative thing of the State Board of
20 Elections when you're talking about saying some
21 School Board member who signed up, if they did,
22 for a three-year term, and then all of a sudden
23 saying that the State Board is using its
24 authority to extend them for a year.

25 MS. EARLS: Well, if it's helpful to the

1 Court, Your Honor, I recall the testimony of the
2 School Board members who said how disruptive it
3 is to have all nine School Board members up for
4 election at the same time, and that at least from
5 the perspective of the School Board, they prefer
6 staggered terms because of issues of continuity
7 of policy and otherwise. So I do recall that
8 testimony in the record.

9 THE COURT: Right. But there was also a lot
10 of testimony about the general concerns of the
11 voters of Wake County. So with all due respect
12 to all nine School Board members who all give
13 their very best every day in that capacity, but
14 that's also another issue for the state, in terms
15 of thinking about the voters' interests of having
16 a chance to vote.

17 Anything else from the plaintiffs? And y'all
18 can, y'all can check, if you would like to make
19 that, check that and make a submission.

20 Again, I appreciate y'all's responses and
21 coming here. As I said at the outset, because of
22 the mandate rule and because the Fourth Circuit
23 did not issue its mandate forthwith on July 1st,
24 this Court did not have jurisdiction and still
25 doesn't until presumably tomorrow when the

1 mandate issues. But also I realize that the
2 election is coming up quickly.

3 So anything else from the plaintiffs?

4 MS. EARLS: No. Thank you, Your Honor.

5 THE COURT: Thank you.

6 Anything else from the County Board?

7 MR. MARSHALL: Very briefly, Your Honor.

8 Not only do I think it's improper for you to
9 consider the remedy and enter a remedy, I want to
10 thank you for holding this hearing today because
11 I think my client is going to be in a very tough
12 predicament in light of Footnote 13 and the Court
13 of Appeals opinion. What I was concerned about
14 was without further guidance from the District
15 Court in terms of a remedy, we would be in a
16 position of having to potentially try to make a
17 judgment call about what to do in November, which
18 could very well set the board up for additional
19 litigation from Ms. Earls, potentially from
20 Mr. Farr, in terms of what the appropriate
21 remedy would be based on Footnote 13, Your Honor.

22 THE COURT: What do you think Footnote 13
23 means? Now that you're standing up and we're
24 talking about it. If you care to --

25 MR. MARSHALL: Well, no, I don't have --

1 Footnote 13, I think it means what it says. And
2 I think that Mr. Farr is correct in that I didn't
3 argue remedies before you during the trial, I
4 didn't argue it in the Fourth Circuit, the
5 plaintiffs didn't argue remedy; it's true that
6 that issue never came up. So the Fourth Circuit
7 certainly did not have anything in the record to
8 address the remedy. And I think what Footnote 13
9 says is, I think I have to read it for what it
10 says, we do not think that -- and I don't have it
11 in front of me.

12 Tom, do you mind handing it to me, please?
13 It's right there.

14 We see no reason why the November '16
15 election should proceed under the
16 unconstitutional plans we spoke about today. It
17 doesn't answer the fundamental question we're
18 here today, which is: So what do we do in
19 November? Do we have no election in November?
20 Do we have elections on the districts that have
21 been struck down within the District Court's
22 discretion based on factors you may or may not
23 find? Do we have districts that are drawn by the
24 Court or the State Board if they felt like they
25 had the authority?

1 You've heard me say over and over, my client
2 has no position on what the District should or
3 shouldn't be. They didn't have that before the
4 litigation, they don't have it after the
5 litigation, but they certainly are in dire need
6 of guidance about what they need to do,
7 especially the staff and employees, between today
8 and November 8th, because the last thing they
9 want to do is start coding a map that's going to
10 be challenged by another party, and then we're
11 all back in court again, except now it's
12 September or October, and then they have to
13 un code the map.

14 THE COURT: So at this point no one at the
15 State Board, I mean the Wake County Board, has
16 coded a map?

17 MR. MARSHALL: They have coded the map for
18 the districts that were struck down by the Fourth
19 Circuit.

20 THE COURT: That work was going on like in
21 June or something?

22 MR. MARSHALL: Right, because if you
23 remember, Your Honor, they had to open and close
24 the filing period in June, which they did.

25 THE COURT: Right, for the Board of

1 Education.

2 MR. MARSHALL: Right. So those maps were
3 previously coded. And, obviously, they've
4 historically coded the previous maps as well.
5 But at some point they've got to make a decision
6 moving forward for November 8th about what is and
7 isn't possible. And the last thing I wanted to
8 have happen was for us to be in September and
9 October and have other parties arguing to us
10 about what the Wake County Board of Elections
11 should or shouldn't be doing with respect to
12 districts and maps absent any further guidance
13 from the Court.

14 So, again, I just want to thank you for
15 calling all the potentially interested parties
16 together to try to get a head start on the
17 remedial phase.

18 And then finally, one other point I didn't
19 make earlier, but we did set it out in our
20 submission. And because the question of
21 deadlines has come up, the ability to hold a
22 primary for the County Commissioner Districts A
23 and B that had been struck down, if new districts
24 were drawn for A and B, holding a primary in
25 advance of holding a general election on the

1 current calendar, we used the word "infeasible"
2 in our submission, and that is certainly true as
3 for the deadlines as they're in place. And I'm
4 not sure, and I don't want to speak for Mr. Sims,
5 but it may not be feasible at all.

6 THE COURT: Not possible.

7 MR. MARSHALL: Correct.

8 THE COURT: That's at least how I read it.

9 MR. MARSHALL: Right.

10 THE COURT: I do think y'all used the word
11 "feasible," but looking at all the dates in
12 Mr. Sims' submission, which was very detailed,
13 and I appreciate it, it didn't seem possible to
14 do that.

15 MR. MARSHALL: Right, because of all that
16 goes into a primary, which is -- it's a election.
17 And everything that goes into holding an election
18 would have to occur. It's not just a filing
19 period. So much of what we've discussed today
20 has been about the November 8th election and what
21 needs to be done before then, and I just wanted
22 to point out that we had in our submission
23 highlighted the real problem of a primary on top
24 of that.

25 Other than that, Your Honor, we do not -- we

1 don't take any position, as we mentioned, on the
2 propriety of any particular remedy but wanted to
3 make sure the Court had everything that you
4 needed in terms of operational issues.

5 THE COURT: Okay. Mr. Lawson, final
6 thoughts?

7 MR. LAWSON: Just one point only. I'm
8 informed by my predecessor who had been general
9 counsel for 15 years that in the days of
10 preclearance, if Your Honor was to indicate that
11 we should be moving back absentee voting or to
12 allow for more time, the Justice Department had
13 indicated a preference in 2004 that absentee
14 ballots for everything else that had a federal
15 contest on it go out and then separately send out
16 any type of straggler absentee ballots. So we
17 would have to contemplate a two-step absentee
18 process with the School Board or school
19 commissioner, whatever that ends up being, being
20 counted manually when they're brought back to the
21 Board of Elections because of the voting systems.

22 THE COURT: Under either scenario, you see
23 that happening?

24 MR. LAWSON: If we were asked to by Your
25 Honor to push the absentee ballot deadline such

1 that we could allow for Wake to code more, I
2 wanted to note.

3 Thank you.

4 THE COURT: Thank you.

5 Mr. Farr, anything else?

6 MR. FARR: Just to thank you, Your Honor, for
7 inviting us, but also I can't help but comment
8 about what Mr. Lawson just said. I cannot
9 imagine a more confusing election process for
10 people voting absentee if they got two different
11 absentee ballots. We think that with all due
12 respect to the Justice Department and their
13 position under Section 5, I think that would be a
14 disaster.

15 And, again, Your Honor, thank you for
16 inviting us to participate today.

17 THE COURT: I thank counsel for their work
18 here today.

19 We will be in recess until tomorrow.

20 THE BAILIFF: All rise. This court now
21 stands in recess.

22 (Hearing concluded at 5:10 p.m.)

23

24

25

1 COURT CERTIFICATE

2

3 NORTH CAROLINA)

4 WAKE COUNTY)

5

6 I, DENISE Y. MEEK, Court Reporter, certify
7 that I was authorized to and did report the foregoing
8 proceedings, and that the transcript is a true and
9 complete record of my stenographic notes.

10 Dated this 3rd day of August 2016.

11



12

DENISE Y. MEEK, FPR
Court Reporter

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